RANHILL WORLEY SDN BHD A

v.

FRANZ JOZEF MARIE SCHEFMAN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
LAU BEE LAN J
[JUDICIAL REVIEW NO: R1-25-273-04]
13 SEPTEMBER 2008

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - To quash award of Industrial Court - Whether Industrial Court erred in law and in excess of jurisdiction* C

LABOUR LAW: *Industrial Court - Remedies - Certiorari, application for - Postponement for applicant to call crucial witness disallowed by Industrial Court - Whether learned chairman acted fairly - Backwages for unexpired period of fixed term contract - Whether logical and reasonable - Whether Industrial Court erred in law and in excess of jurisdiction* D

The applicant herein had challenged an award of the Industrial E
Court on two grounds: (i) that the Industrial Court had erred in law in awarding the claimant backwages for the unexpired period of his fixed term contract and (ii) that the Industrial Court had erred in law for not calling a crucial witness to testify. The court had found that the Industrial Court had not committed any error F
of law in respect of the two grounds challenged by the applicant and dismissed the applicant's application. The applicant appealed against the said decision. *Vide* an application for judicial review, the applicant sought essentially for an order of *certiorari* to quash the said award handed down by the Industrial Court. Briefly, the G
applicant, formerly known as Jacobs Construction Management (Malaysia) Sdn Bhd (Jacobs) was joined as a party in this proceeding by order of court. Pursuant to an acquisition agreement entered between Jacobs Engineering Group Inc (JEG) and Stork NV, the applicant attempted to sell their business model H
in Malaysia by acquiring Stork Comprimo (Malaysia) Sdn Bhd. JEG operated in Malaysia through its wholly owned subsidiary, Jacobs, now the applicant. Following the acquisition, JEG expressed an intention to accept the first respondent into their employment whereby it was stated that Jacobs would adopt all the I
terms and conditions contained in the first respondent's employment agreement with Stork Comprimo (M) Sdn Bhd.

A However, on 11 May 2001, the first respondent received a letter from the applicant informing him that he would be demobilized from work on even date by giving him four months notice of termination, alleging that the respondent's role had become redundant. The respondent disputed the applicant's reason for
B termination and sought for reinstatement without any loss whatsoever. Hence, the dispute before the Industrial Court where the latter held that the termination was without just cause and excuse; and ordered the applicant to pay the first respondent the sum of RM534,665.30 having found that reinstatement was not an
C appropriate remedy. The applicant had two main grounds of challenge: (a) that the Industrial Court had awarded backwages of 34 months from 11 May 2001 to 31 July 2004 even though the claimant was an expatriate with a valid work permit that expired on 26 September 2001 and (b) that the Industrial Court did not
D allow for a postponement for the applicant to call one Curtis Landry from Canada.

Held (dismissing applicant's application):

E **(1)** As early as 10 November 2003, the applicant and applicant's counsel had due notice from the court as to its position *vis a vis* their application to have the testimony of Curtis Landry whom they knew to be a crucial witness recorded on a later date; this court did not see why they were again seeking an
F adjournment from the court on 3 December 2003 for the reason 'because of unforeseeable circumstances.' Having known the mind of the Chairman as at 10 November 2003, and if the applicant had a valid and genuine reason for Curtis Landry not being able to come to Court on 3 December
G 2003, and they intended to seek a postponement they should have applied by a letter to court well in advance *ie*, as early as 10 November 2003 and not on 3 December 2003. The learned Chairman had acted fairly. Equity and good conscience must apply to both parties. (paras 8 & 9)

H **(2)** If reinstatement was awarded, it would entail payment of backwages from the date of dismissal till date of reinstatement which would far exceed the amount of backwages payable to the expatriate who is normally engaged on a fixed term contract. Thus, it was only logical and reasonable that the
I first respondent be awarded backwages for the remainder of the unexpired period of his fixed term contract which was

exactly what the learned Chairman did. Hence, there was no error of law or acting in excess of jurisdiction. In addition, reinstatement was inappropriate because the first respondent since his termination found fresh employment and based on evidence from the applicant, there was no such position of Director of Marketing and Sales; thus it was apparent the order of reinstatement was not an issue linked to work permit. The issue in the Industrial Court was whether the first respondent's dismissal was just cause or excuse; and if the court found it to be in the affirmative, the first respondent ought to be awarded the remedy irrespective of whether he was still holding a valid work permit. (para 11)

(3) The Industrial Court had not erred in law or acted in excess of its jurisdiction. The determination of quantum of backwages is at the discretion of the Industrial Court. (para 12)

[Order accordingly.]

Case(s) referred to:

Assunta Hospital v. Dr A Dutt [1981] 1 MLJ 115 ***(refd)***

Man Yau Holdings Bhd v. Pakirisamy Karunakaran [2003] 2 ILR 16 ***(refd)***

Matrix Fire System Sdn Bhd v. Azman Shah Abdul Samad [1999] 7 CLJ 424 HC ***(refd)***

Microsoft Malaysia Sdn Bhd v. Michael Brian Davis [2002] 2 ILR 453 ***(refd)***

Rohana Ariffin v. Universiti Sains Malaysia & Another Case [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 HC ***(refd)***

Shahpadu Energy & Engineering SB v. Stuart Ashley Eban [1999] 1 LNS 196 ***(refd)***

Stamford College v. Leslie Dolores Swanson [1997] 1 ILR 152 ***(refd)***

Tyco Engineering and Construction (M) Sdn Bhd v. James Francis Trimble [2001] 1 ILR 120 ***(refd)***

Tyco Engineering and Construction (M) Sdn Bhd v. James Francis Trimble & Anor [2005] 7 CLJ 236 HC ***(refd)***

United Engineers (Malaysia) Bhd v. Jurgen HH Dorbecker [1993] 2 ILR 48 ***(refd)***

Legislation referred to:

Employment (Restriction) Act 1968, ss. 5, 6, 7
Industrial Relations Act 1967, s. 30
Rules of the High Court 1980, O. 53 r. 3(2)

For the applicant - T Thavalingam; M/s Zaid Ibrahim & Co
For the 1st respondent - Teh Hong Jet (Tan Hwee Hwee with him); M/s Tan Kim Siong & Teh Hong Jet

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:

[1] The applicant has appealed against the decision of the court made on 14 March 2008 wherein I had ruled as follows:

> 1. The Court has considered the submissions of both the learned Counsel for the Applicant and the 1st Respondent. The Applicant challenged the Award No. 1263 of 2004 dated 30.9.2004 on two (2) grounds:
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> (i) that the Industrial Court had erred in law in awarding the Claimant backwages for the unexpired period of his fixed term contract; and
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> (ii) that the Industrial Court has erred in law for not calling Curtis Landry.
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> 2. I am of the view that based on the Record and the authorities, the Industrial Court has not committed any error of law in respect of the two (2) grounds challenged by the Applicant. Thus there is no reason for the Court to interfere with the Industrial Court's decision. Therefore the application of the Applicant is dismissed with cost.

[2] The brief facts of the case for purposes of this appeal are as follows. The applicant was formerly known as Jacobs Construction Management (Malaysia) Sdn. Bhd. (referred to as "Jacobs" in the award) was joined as a party in this proceeding by order of court dated 19 March 2003. The 1st respondent had entered into an Employment Agreement (exh. RG-1/COE1) for a period of five (5) years with Stork Comprimo (Malaysia) Sdn Bhd commencing from 1 August 1999 and terminating on 31 July 2004 (or pursuant to Part 1 cl. 3 of the further terms and conditions hereto). Pursuant to an Acquisition Agreement dated 16 February 2004 entered between Jacobs Engineering Group Inc and Stork N.V., the applicant attempted to sell their business model in Malaysia by acquiring Stork Comprimo (Malaysia) Sdn Bhd through the global acquisition of Stork N.V. Holland. As part of that acquisition, Jacobs Engineering Group (JEG) acquired Stork's assets and business relationship with Protek Engineers Sdn Bhd. JEG's principal interest in acquiring Stork was to strengthen its market position in Northern Europe. The Malaysian operation was included in the Stork deal and offered JEG an opportunity to explore market opportunities in Malaysia. JEG operated in Malaysia

through its wholly owned subsidiary, Jacobs, now the applicant. Following the acquisition the 1st respondent received a letter dated 16 February 2000 (p. 44, Rosli's affidavit/CL2) whereby JEG expressed an intention to accept the 1st respondent into their employment whereby it was stated in the said letter that Jacobs shall adopt all the terms and the conditions contained in the 1st respondent's Employment Agreement with Stork Comprimo (M) Sdn. Bhd. It is not disputed that *vide* a letter dated 27 February 2001 (p. 45, Rosli's; affidavit/CL3) Jacobs had informed the 1st respondent that effective 1 January 2001, the 1st respondent's new salary was fixed at RM24,193 per month. On 11 May 2001 the 1st respondent received a letter from the applicant informing him that he would be demobilized from work on even date by giving him four (4) month's notice of termination (p. 46, Rosli's affidavit). The 1st respondent replied *vide* his letter dated 14 May 2001 disputing the applicant's reason for termination as "lack of work and reduction in workload." The applicant replied *vide* letter dated 24 May 2001 (pp. 49-50, Rosli's affidavit), *inter alia*, alleging that the 1st respondent's role had become redundant as they did not require his expertise in the EPC sector. The 1st respondent replied *vide* his letter dated 29 May 2001 stating, *inter alia*, that his responsibilities included "engineering services" besides the EPC sector; that it was never indicated to him that his work was becoming or would become redundant but on the contrary was praised for his services which resulted in more than 30% salary increase; he also sought for reinstatement without any loss whatever (pp. 51-53, Rosli's affidavit). The applicant replied *vide* letter dated 31 May 2001 stating that they were unable to accede to his request for reinstatement. Hence the dispute before the Industrial Court pertain to the dismissal of the 1st respondent by the applicant on 11 May 2001 as stated in the Minister's Reference dated 5 June 2002. At the conclusion of the hearing, the Industrial Court found that the applicant had failed to prove on a balance of probabilities that the 1st respondent was redundant and his termination was without just cause and excuse; and ordered the applicant to pay the 1st respondent the sum of RM534,665.30 free of tax within 60 days of the award having found that reinstatement is not an appropriate remedy.

[3] *Vide* an application for judicial review dated 2 December 2004 the applicant (the company in the Industrial Court proceedings), sought essentially for an order of *certiorari* under O. 53 of the Rules of the High Court 1980 ("the RHC") to

quash Award No. 1263 of 2004 and handed down by the Industrial Court on 30 September 2004. In addition Encik T. Thavalingam, learned counsel for the applicant, relying on prayer (c) of the application in that the court is entitled to order any relief it deems; fit, in oral submission had urged the court to also remit the matter to the said Industrial Court Chairman to record the evidence of one of the applicant's key witness, one Mr. Curtis Landry and subject to cross-examination by the learned counsel for the 1st respondent as the Industrial Court Chairman and both the counsel for the applicant and the 1st respondent are still around.

3.1. The cause papers involved in the applicant's application are:

(i) on the part of the applicant:

a. Application for judicial review dated 2 December 2004 (encl. 1)

b. Statement pursuant to O. 53 r. 3(2) of the RHC dated 2 December 2004 (encl. 2)

c. Affidavit of Rosli bin Ab. Ghani affirmed on 1 December 2004 ("Rosli's affidavit") (encl. 3)

d. Affidavit (Supplementary) affirmed by M.S. Teofilus Ponniah on 15 February 2005 (encl. 11).

(ii) on the part of the 1st respondent:

(a) the affidavit of the 1st respondent himself affirmed on 5 January 2006 (encl. 12).

[4] The applicant has two main grounds of challenge as deposed in paras 30 to 36 of Rosli's affidavit and they are:

(i) that the Industrial Court had awarded backwages of thirty four (34) months from 11 May 2001 to 31 July 2004 even though the claimant is an expatriate with a valid work permit that had expired on 26 September 2001; and

(ii) that the Industrial Court did not allow for a postponement for the applicant to call Curtis Landry from Canada.

4.1 In oral submission Mr. T. Thavalingam stated that the crux of the applicant's application for judicial review was the applicant was not given the opportunity to produce a material witness whose role in the termination of the 1st respondent's services was crucial; and if he succeeded on this 2nd ground, then the 1st ground did not arise.

[5] As submitted in the applicant's Outline Submission dated 14 March 2007 (encl. 14), the 2nd ground of challenge is as follows:

> The person who could have shed some light on the real reason for the Claimant's termination, Curtis Landry was not called. It is true that after the Company had called 4 witnesses the Company sought an adjournment to enable the said Curtis Landry to attend Court. However, in light of the fact that the Court had granted an adjournment to the Company on a prior occasion for just such a reason and the case has been pending since 2002, the Court has refused to allow any further adjournments. (p. 27 of the Award; p. 516 of Rosli's Affidavit).

5.1. It was thereby submitted the learned Chairman of the Industrial Court erred in law and acted in excess of its jurisdiction when:

(a) It failed to act in accordance with equity and the general policy and scheme of the Industrial Relations Act 1967 when it failed to allow the Applicant's application for an adjournment to enable the Applicant to secure the attendance of Curtis Landry, a foreigner who resides in Canada. Curtis Landry is one of the key witnesses who would have been able to give evidence on the facts and reasons the 1st Respondent's services were terminated on 11.05.2001;

(b) it failed to take into account the relevant factor that the first application for an adjournment of the trial was due to the difficulties in securing the attendance of the witnesses from Singapore and Canada *vide* letter dated 20.5.2003 and the same was due to circumstances and events that were unpredictable and beyond the control of the parties. The same was due to the outbreak of SARS ("Severe Acute Respiratory Syndrome") at that point of time.

[6] The 1st respondent opposed basically submitting that:

(i) the learned Chairman of the Industrial Court had taken into account all the relevant facts and had rightly exercised her discretion before deciding not to grant the postponement; and

(ii) the learned Chairman of the Industrial Court did not restrict the applicant from presenting their case.

[7] In support of their contention that the lack of opportunity for the applicant to present their case through Curtis Landry was a breach of natural justice, the applicant relied principally on *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487 and the following passages from the report referred to were:

> (i) It is a well-established principle of administrative law that anything that restricts, or appears to restrict, the defendant's ability to present his case may be held to be a breach of procedural fairness and, thereby, susceptible to judicial review; for example, a defendant is generally entitled to notice of evidence that might assist his case. It is, therefore, a breach of natural justice for the prosecution to conceal such evidence: *R v. Leyland Justice, ex p Hawthorn*. (p. 493 (left) B-C);
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> (ii) Natural justice is but fairness writ large and juridically. It has been described as fairplay in action. (p. 495 D (right); and
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> (iii) I must next turn to consider another ground relied upon by the applicants as showing a lack of fairness on the part of the disciplinary authority and this is it was reflected in the procedure it adopted in the examination of certain student witnesses whose testimony was most material to charges 3, 4 and 5 which the applicant Hashim faced. (p. 496 B (left)).

[8] The court agrees wholly with the principles propounded in the case of *Rohana bte Afriffin (supra)*. The point is whether on the factual matrix of this instant case, there has been any breach of procedural fairness in the manner contended by the applicant.

8.1. It is not disputed from the award of the learned Chairman, that after evaluating the evidence of particularly COW1 and COW2, she considered Curtis Landry to be a material witness "who could have shed some light on the real reason for the Claimant's termination." It is also not disputed the first hearing dates were 27 till 29 May 2003.

Then on 6 May 2003 (case management) Mr. Thavalingam informed the court that he had difficulty in recording witness statements as witnesses were from Singapore and Canada but requested for the hearing dates to be maintained for purposes of an amicable settlement. *Vide* letter dated 20 May 2003 to the Industrial Court (exh. RG6, p. 77 encl. 3), the applicant's solicitor sought the 1st adjournment due to the SARS outbreak and requested 27 May 2003 to be treated as a mention date and thus on the even date, the court fixed the new hearing dates on 1-3 December 2003 and 10 November 2003 as mention date. On 10 November 2003 Mr. Thavalingam informed the court that one of their witnesses, Curtis Landry could not attend court as he was based in Canada and prayed for his evidence to be recorded later. Mr. Teh Hong Jet, learned counsel for the 1st respondent "objected vehemently" stating "case has been fixed since May 2003. The witness should have known about this. Unfair for the claimant to wait/come back again as he too is based overseas in Thailand. Justice Delayed is Justice Denied". The learned Chairman ruled in no uncertain terms that she wanted the hearing to proceed and to be completed during the allocated hearing dates (p. 8 NOP, encl. 11):

> Application denied.
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> Case to proceed and to be completed.
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> To 1-3 December 2003 (Hearing).

8.2. It was pointed out by Mr. Thavalingam that they did not seek adjournment but proceeded with the hearing and four witnesses were called by the applicant. However on 3 December 2003 after the COW4 had testified, Mr. Thavalingam applied for adjournment "to call Curtis Landry" and stated "On this occasion (Curtis Landry) could not come because of unforeseen circumstances." The learned Chairman ruled p. 54 NOP, encl. 3):

> We had stated that we would grant no further adjournments. Can Claimant complete his evidence today?

When Mr. Teh answered in the affirmative, she ruled (p. 55 MOP, encl. 3):

> Adjournment not allowed.

8.3. Mr. Teh submitted that the applicant gave "No reason nor was there any letter from the said witness to explain why he could not attend court (on 10 November 2003)." I agree partially with Mr. Teh in that there is no letter from Curtis Landry explaining why he could not attend during the session from 1-3 December 2003 but I find the reason was given orally by Mr. Thavalingani that Curtis Landry could not attend court as he was based in Canada.

8.4. In submitting that the refusal to allow any adjournment showed a lack of fairness on the part of the Industrial Court and that it restricted the applicant's ability to present its case which was tantamount to a breach of procedural fairness, Mr. Thavalingam had orally submitted "It is not that we took the court by surprise, indicated at case management on 10 November 2003. Court could have said that if your witness cannot come, can come another day." With regret I find this submission misconceived.

8.5. I find the learned Chairman's conduct on 3 December 2003 was consistent with her stand taken on 10 November 2003 (case management) when she disallowed Mr. Thavalingam's request for Curtis Landry to be called later and she wanted the case to "proceed and to be completed" during the session of 1-3 December 2003. As I have alluded to earlier the learned Chairman had expressly voiced her stand in refusing the applicant's request to have Curtis Landry's evidence recorded on a later date (and not 1-3 December 2003).

8.6. In my view as early as 10 November 2003 the applicant and applicant's counsel had due notice from the court as to its position *vis-a-vis* their application to have the testimony of Curtis Landry whom they knew to be a crucial witness recorded on a later date; so I do not see why they were again seeking an adjournment from the court on 3 December 2003, this time for the reason "because of unforeseeable circumstances". Subject to what

I said regarding the oral application for adjournment made by learned counsel for the applicant for the reason that Curtis Landry was based in Canada, I wholly agree with Mr. Teh that it is indeed baffling why having known the mind of the learned Chairman as at 10 November 2003, and if the applicant had a valid and genuine reason for Curtis Landry not being able to come to court on 3 December 2003 and they intended to seek a postponement, they should have applied by letter to court well in advance ie, as early as after 10 November 2003 and not on 3 December 2003 itself.

8.7. Having regard to the facts of the case, I find that the learned Chairman has acted fairly because as submitted by Mr. Teh equity and good conscience must apply to both parties and in this regard in addition to what I have alluded to before this, on 10 November 2003 learned counsel for the applicant had due notice that the respondent had objected vehemently to his application for the evidence of Curtis Landry be heard on a later date.

[9] For the reasons given, I was of the view that the grounds upon which the 2nd ground of challenge was premised on cannot be sustained and the Industrial Court has not erred in law or acted in excess of its jurisdiction.

[10] At the outset of the hearing Mr. Thavalingam informed the court that if he succeeded on the 1st ground of challenge, the 2nd ground of challenge did not arise. Thus since I have found that the 1st ground is without merit, I shall now move on to the 2nd ground of challenge which is against the portion of the award at p. 29 (at p. 518 of the Rosli's affidavit):

The Claimant's Employment Contract COE 1 was for a period of 5 years. It commences on 01.08.1999 and would have terminated on 31.07.2004. Since the Claimant was terminated on 11.05.2001, there would have been 38 months remaining on his contract. And since the Claimant's was paid 4 months salary as part of his compensation package, the Court will deduct 4 months out of the 38 months remaining on his contract. Thus 38-4 months = 34 months.

10.1. In essence it is the applicant's contention that the 1st respondent was only entitled to be paid backwages from the termination of his contract till the expiry of his work permit. Hence the learned Chairman had erred in law and in excess of jurisdiction when (pp. 9-10 of applicant's outline submission):

(a) it failed to take into account the relevant factor that the 1st respondent is an expatriate and that his services in Malaysia is subject to a valid work permit to be issued by the Malaysian Immigration Department.

(b) it failed to take into account the relevant factor that the Industrial Relations Act 1967 is not applicable to the 1st respondent after his valid work permit expired on 26 September 2001.

(c) it failed to take into account the provisions of the Employment (Restriction) Act 1968 (Revised 1988) Act 353 which stated that a person who is not a Malaysian citizen cannot be employed to work in Malaysia unless such person is in possession of a valid work permit.

(d) it failed to take into account the relevant factor that the applicant had paid the 1st respondent all contractual dues as stated under the employment contract until his valid work permit expired on 26 September 2001 and therefore failed to limit his backwages to the expiry date of the valid work permit which is 26 September 2001.

(e) it held that the 1st respondent is entitled to receive backwages from the period of 11 May 2001 to 31 July 2004, even though the 1st respondent was an expatriate and was unable to work legally in Malaysia after his valid work permit expired on 26 September 2001.

(f) it held that the 1st respondent was entitled to receive backwages from the period of 11 May 2001 to 31 July 2004 as such a decision was reflective that the 1st respondent has a valid work permit until 31 July 2004.

(g) in reaching such a decision that the 1st respondent was entitled to receive backwages from the period of 11 May 2001 to 31 July 2004, it acted in excess of its jurisdiction and assumed the special powers of the Malaysian Immigration Department to extend the validity of the 1st respondent's work permit from 26 September 2001 to 31 July 2004.

(h) it failed to take into account the fact that the 1st respondent did not provide any evidence to show that the validity of his work permit would have been extended from 26 September 2001 to 31 July 2004.

10.2. The 1st respondent opposed arguing that it was never the established principle that an expatriate whose services were unlawfully or unfairly terminated is only entitled to backwages up to the expiry of his work permit.

[11] It can be seen that essentially the applicant's bone of contention revolved on the issue of work permit and in this instant case the work permit of the 1st respondent was shown to have expired 26 September 2001; thus backwages should not be awarded beyond that cut-off date. I am persuaded by the arguments canvassed on behalf of the 1st respondent and the cases cited in support thereof. Learned counsel for the 1st respondent submitted that the there is a consistent trend of cases which decided that an expatriate who has been unfairly dismissed was awarded backwages for the unexpired period of his fixed term contract. I agree that these are the positions taken in *United Engineers (Malaysia) Bhd v. Jurgen H.H. Dorbecker* [1993] 2 ILR 48; *Shahpadu Energy & Engineering SB v. Stuart Ashley Eban* [1999] 1 LNS 196; *Man Yau Holdings Bhd. v. Pakirisamy Karunakaran* [2003] 2 ILR 16; *Microsoft Malaysia Sdn Bhd v. Michael Brian Davis* [2002] 2 ILR 453; *Tyco Engineering and Construction (M) Sdn. Bhd. v. James Francis Trimble* [2001] 1 ILR 120; *Tyco Engineering and Construction (M) Sdn. Bhd. v. James Francis Trimble & Anor* [2005] 7 CLJ 236 (HC); *Stamford College v. Leslie Dolores Swanson* [1997] 1 ILR 152.

11.1 In *Microsoft Malaysia (supra)*, the claimant was a non-citizen and the issue before the Industrial Court was whether reinstatement should be ordered and if reinstatement is not appropriate, the appropriate compensation payable (by way of *certiorari* proceedings the claimant was held to be unjustly

dismissed). In support of his submission that the Industrial Court is not impeded from awarding reinstatement to a foreigner, counsel for the claimant referred to the *Assunta Hospital v. Dr. A Dutt* [1981] 1 MLJ 115 where from the judgment at p. 116 B-D (left) the Federal Court held that an expatriate ought to be afforded the remedy of reinstatement and the issue of work-permit is not a matter that can influence the court in the proper exercise of the jurisdiction conferred on it by the minister's reference of the representations for reinstatement. As pointed out by Mr. Teh if reinstatement was awarded it would entail payment of backwages from the date of dismissal till date of reinstatement which would far exceed the amount of backwages payable to the expatriate who is normally engaged on a fixed term contract. Thus, in this present case, I agree that flowing from the principle propounded in *Dr. A Dutt*'s case *(supra)*, surely it is only logical and reasonable that the 1st respondent be awarded backwages for the remainder of the unexpired period of his fixed term contract which was exactly what the learned Chairman did. Hence, I find there is no error of law or acting in excess of jurisdiction.

11.2. In addition the learned Chairman in the present case held reinstatement was inappropriate because the 1st respondent since his termination found fresh employment and based on evidence from the applicant, there was such no position of Director of Marketing and Sales (p. 28 of award/p. 517 of Rosli's affidavit); thus it is apparent that the order of reinstatement is not an issue linked to work permit. Furthermore following *Dr. A Dutt*'s case *(supra)*, whether 1st respondent had a valid work permit or not is irrelevant.

11.3. With respect, I also find the applicant's argument on the failure of the learned Chairman to take into account ss. 5, 6, and 7 of the Employment Restriction Act 1968 (Rev 1988) (Act 353) cannot hold water. The reason is the issue in the Industrial Court is whether the 1st respondent's dismissal was with just cause or excuse; and if the court finds it to be in the affirmative, the 1st respondent ought to be awarded the remedy irrespective of whether he was still holding a valid work permit.

11.4. Learned counsel for the 1st respondent submitted that the determination of quantum of backwages is at the discretion of the Industrial Court and he cited *Matrix Fire System Sdn Bhd v. Azman Shah Abdul Samad* [1999] 7 CLJ 424. In this case the Industrial Court found the respondent to be unjustly dismissed after working as a probationary project executive with the applicant for two weeks; the respondent applied for an order of *certiorari* to quash the award, *inter alia*, on the ground that the compensation sum of RM26,000 was excessive and unreasonable. On this point, in refusing to interfere with the Industrial Court's decision, Nik Hashim J (now Federal Court judge) at p. 431 held "Since there is legal basis for paying compensation, the question of quantum is very much a matter of discretion of the learned Chairman to fix under s. 30 of the Act"

A similar view was adopted by Azmel J (as he then was) in *Shapadu Energy & Engineering SB (supra)* and I agree with the views so expressed.

[12] Thus for the reasons given I also found the grounds mounted in respect of the 2nd ground of challenge cannot be sustained. In conclusion, I am of the view that the Industrial Court has not erred in law or acted in excess of its jurisdiction. Accordingly, the applicant's application is dismissed with costs.